83-895

NO.

Office-Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

VAUGHN PEARSON,

PETITIONER,

v.

COLUMBIA BRIARGATE COMPANY,

RESPONDENT.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

Respondent's Brief in Opposition

T. Alexander Beard, Esquire
COOPER, BOWEN, BEARD & SMOOT
1111 Broad Street
Post Office Drawer 99
Camden, South Carolina 29020
Telephone: (803) 432-5111
Counsel for Respondent

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Argument in Opposition to Writ ..	1
Conclusion	7
Certificate of Service	8

TABLE OF AUTHORITIES

CASES	Page
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	7
Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87 (2nd Cir. 1975)	1,3
Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir. 1981)	1,4
Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974)	2
Wilshire Oil Co. of Texas v. Riffe, 409 F.2d 1277 (10th Cir. 1969)	2,3

ARGUMENT IN OPPOSITION TO WRIT

Petitioner Vaughn Pearson's Statement of the Case and Question Presented are misleading in that they give the impression that Pearson was a passive agent for the Bank with only minimal contacts with the forum state. This was not the case. All of the activities which formed the gravaman of the cause of action were performed by Pearson while he was in the State of South Carolina (App. A-6).

Pearson's basis for the Writ is that the Court of Appeals' decision conflicts with the decisions of other Circuits. He cites the following cases to support this argument: Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir. 1981); Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d

87 (2nd Cir. 1975); Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974); Wilshire Oil Co. of Texas v. Riffe, 409 F.2d 1277 (10th Cir. 1969). The decision of the Fourth Circuit Court of Appeals, however, is not in conflict with the other courts. The decision of the Court of Appeals goes into considerable detail to distinguish these cases from the case at bar on the grounds that the agent had not actually and/or individually participated in a tort in the forum state (App. A-23).

In Weller v. Cromwell Oil Co., supra, the Court pointed out that the individual defendants (corporate agents) were never in the forum state. All contacts with the forum state were through the mails and by telephone. The Court

held that such contacts were insufficient to allow the exercise of in personam jurisdiction over the individual defendants and rested its dismissal of the action against the individual defendants on the fact that such defendants ". . . were never in the State of Ohio to commit any act or omission."

The court in Wilshire Oil Co. of Texas v. Riffe, supra determined that the activities which brought the individual corporate agents within the long-arm statute were unrelated to the cause of action that was the basis for the suit. The plaintiffs in Lehigh Valley Industries, Inc. v. Birenbaum, supra failed to provide evidence that the individual agent committed any tortious activity in the forum state.

This is in contrast to the case at bar where all of Pearson's tortious acts were committed in the forum state.

To allege that the Court of Appeals decision is in conflict with the other Circuits that have considered the question of the fiduciary shield doctrine is to ignore the facts and rationale of the Court's lengthy opinion.

Petitioner further argues that the fiduciary shield doctrine is one of constitutional dimensions which was disregarded by the Court of Appeals. Petitioner relies heavily on the case of Marine Midland Bank, N.A. v. Miller, supra in support of its theory. Petitioner ignores the fact that the Court in Marine Midland Bank specifically stated that: "The fiduciary shield doctrine is not a constitutional

principal but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute." The Court went further and characterized the doctrine not as a matter of statutory construction but rather as an "equitable doctrine" under the long-arm statute. It is not to be applied inflexibly or "mechanically" but rather to be applied by the Court with a "sound exercise of discretion" in order to achieve the ultimate purpose of "fairness" arising out of an "analysis of the particular facts of the case." (App. A-11).

A major part of the Court's opinion examines the constitutional issues raised by the Petitioner in its brief below. The Court of Appeals cites numerous cases to support the finding that the fiduciary shield doctrine is

not one founded on constitutional interpretation but rather statutory construction and/or traditional notions of "fairplay." (See App. A-9 - A-23). Nevertheless, the Court of Appeals did review the due process requirements established by the Supreme Court for acquiring jurisdiction in a forum state over a non-resident corporate agent under a state's long-arm statute. The Court of Appeals found that Pearson had sufficient minimum contacts with the forum state to satisfy the due process requirements. The Court found that it was not unfair to subject an individual corporate agent to in personam jurisdiction where he physically enters the forum state and commits a tort while in the state.

CONCLUSION

To accept Petitioner's test for fairness and due process would be to accept a new standard that has not been established by any court. The so-called fiduciary shield doctrine is really nothing more than a new name for the fairness doctrine established years ago in the case of International Shoe Co. v. Washington, 326 U.S. 310 (1945). For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

COOPER, BOWEN, BEARD & SMOOT

By: T. Alexander Beard

T. Alexander Beard
Attorneys for Respondent
1111 Broad Street
Post Office Drawer 99
Camden, South Carolina 29020
Telephone: (803) 432-5111

December 23, 1983

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit have been furnished by mail to Ernest E. Figari, Jr., Esquire, 4700 InterFirst Two, Dallas, Texas 75270 on December 28, 1983. I further certify that all parties required to be served have been served.

T. Alexander Beard

T. Alexander Beard
Counsel for Respondent